92-1883

Supreme Court, U.S.
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Case Number _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

WILBUR BROWN,

Petitioner,

v.

LLOYD BENTSEN, SECRETARY OF THE UNITED STATES TREASURY

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does the Civil Service Reform Act of 1978, Pub. L. 950454, 92 Stat. 11 ("CSRA"), preempt 5 U.S.C. § 702 and preclude federal court jurisdiction over claims by federal employees seeking equitable remedies for constitutional violations which occurred in connection with their employment?

LIST OF PARTIES

Petitioner Wilbur Brown was the plaintiff and appellant below.

Respondent The Secretary of the Treasury was the defendant and appellee below.

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Case Number _____

IN THE SUPREME COURT OF THE UNITED STATES

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WILBUR BROWN,

Petitioner,

v.

SECRETARY OF THE UNITED STATES TREASURY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

Petitioner Wilbur Brown respectfully prays that a writ of certiorari issue to review the judgment of the Ninth Circuit Court of Appeal, filed November 18, 1992, of which rehearing and/or rehearing en banc was denied on January 13, 1993.

I. OPINIONS BELOW

The order denying rehearing and/or rehearing en banc is reprinted in the Appendix hereto as Exhibit A, at page 1.

The unreported memorandum opinion of the Ninth Court of Appeal is reprinted in the Appendix hereto as Exhibit B, beginning at page 2.

The unreported memorandum decision of the trial court (Patel, J.) is reprinted as Exhibit C in the Appendix hereto, beginning at page 14.

II. JURISDICTION

The relevant claims by Brown were predicated on the Due Process clause of the Fifth Amendment. The trial court had jurisdiction pursuant to 28 U.S.C. § 1331 and/or 5 U.S.C. § 702.

On October 2, 1990, the trial court, The Honorable Marilyn Hall-Patel presiding, entered judgment in favor of the Secretary. On November 30, 1990, Brown filed a timely notice of appeal. On November 18, 1992, the Ninth Circuit Court of Appeal filed its memorandum opinion affirming the judgment of the trial court. Brown timely filed a petition for rehearing, which was denied by order dated January 14, 1993.

The jurisdiction of this Court to review the judgment of the Court of Appeal is invoked under 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED

The statutes and regulations involved, U.S. Const., 5th Amendment; 5 U.S.C. §§ 701 et seq.; 5 U.S.C. §§ 2301 et seq., 5 U.S.C. §§ 7501 et seq.; and E.O.

10450, are reprinted in the appendix beginning at page 14.

IV. STATEMENT OF THE CASE

A. Overview

As stated previously, the issue presented is whether the Civil Service Reform Act of 1978 ("CSRA"), P.L. 95-454, 92 Stats. 1111, preempts jurisdiction over claims by a federal employee seeking equitable remedies for constitutional violations arising from the employment relationship.[1]

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1. Brown notes that as yet no court has discussed the interplay between the CSRA and 5 U.S.C. § 702 (App. at 16), which grants jurisdiction over claims seeking "relief other than money damages," and which would appear to grant jurisdiction separate from, and not subject to elimination by, the CSRA, an issue that need not be reached until the merits are argued.

By way of background, prior to enactment of the CSRA there was a patchwork of remedies and procedures relating to federal employee rights and remedies. The CSRA, codified in various parts of Title 5, created a uniform system of principals to be applied to all "employees" as defined by 5 U.S.C. § 7501(1).[2] An employee who suffered an adverse personnel action (defined in 5 U.S.C. §§ 7501(2) and 7502[3]), or who has been injured by any prohibited personnel practice (defined by 5 U.S.C. § 2302[4], is provided explicit administrative procedures, with judicial review of agency

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2. See App. at 55.

3. See App. at 55, 56.

4. See App. at 35.

decisions provided for by 5 U.S.C. § 7503[5].

There was, initially, some question about whether the CSRA preempted so-called Bivens[6] claims by federal employees; i.e., claims seeking money damages for employment-related constitutional violations. *Compare* McIntosh v. Weinberger, 810 F.2d 1411, 1434-36 (8th Cir. 1987) (Bivens claims not preempted) and Kotarski v. Cooper, 799 F.2d 1342, 1344-45 (9th Cir. 1986) vacated and remanded 487 U.S. 1212 (1988) (same) *with* Hallock v. Moses, 731 F.2d 754, 757 (11th Cir. 1984) (Bivens claims preempted by

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5. See App. at 56.

6. *See*, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (creating money damages remedy for violation of constitutional rights by government employees).

CSRA).

In Schweiker v. Chiliki, 487 U.S. 412 (1988), this Court held that the remedial provisions of the Social Security Act precluded Bivens claims against agency personnel. Shortly thereafter this Court indicated that Schweiker applied to the CSRA scheme as well. *See*, Kotarski v. Cooper, 487 U.S. 1212 (1988) (remanding appellate court decision that CSRA did not preempt Bivens claims for reconsideration in light of Schweiker.) However, while this Court has, as discussed below, strongly indicated that the CSRA does **not** preempt equitable constitutional claims, the issue has not been squarely decided by the Court, and, as also discussed below, the Circuit Courts have reached contrary conclusions on the question. With the broad issues thus stated, Brown turns to

the specifics of the case at bar.

B. Statement of Facts

In 1981, Brown was acquitted of a murder charge after a jury trial. On June 27, 1987, Brown began working at the United States Mint in San Francisco as a Metal Forming Machine Operator under a temporary appointment not to exceed one year, an appointment later extended to December 6, 1988.

From the beginning, Brown observed that the Mint's Filipino supervisors consistently applied a different, far harsher, standard in judging the work of non-Filipino employees. Brown repeatedly complained about this pervasive discrimination.

In March of 1988, the Mint learned that Brown had been charged with, and

acquitted of, a crime. Mint management asked Brown to sign an authorization allowing access to the police files on the matter. Brown complied.

Some weeks later, Brown was pulled from the workplace and taken to an office. There, he was confronted by a security officer who stated that Brown would have to immediately answer, in writing, a set of written questions regarding the events of eight years before. Brown asked to review the police files, and also asked that he be allowed to read the written questions, rather than answering them as given verbally. These requests were refused, as was Brown's request to consult with an attorney. Brown stated that he could not discuss the matter under the circumstances demanded by the Mint.

After this incident, Brown continued

expressing his concerns about workplace-wide discrimination. Brown voiced the additional complaint that other persons employed at the Mint were convicted felons and had never been asked any questions about the crimes of which they had been convicted, while Brown had been investigated regarding a charge of which he had been acquitted only after complaining of reverse discrimination.

On August 17, 1988 the Mint terminated Brown effective immediately, "due to [Brown's] failure to cooperate in a security investigation, as required by E.O. 10450 for federal government employees." The Merit Systems Protection Board dismissed Brown's appeal because it had no jurisdiction to review claims by temporary employees such as Brown. This action followed.

C. Proceedings Below.

Brown's complaint in the District Court asserted 6 claims for relief: the first three for racial discrimination in violation of 42 U.S.C. § 2000e-16; the fourth count asserted retaliatory firing for whistle blowing; the fifth count asserted denial of due process as to the basis and manner of termination; and the sixth count sought reinstatement as an equitable remedy for all claims presented. Brown's Due Process claim asserted that the Secretary acted illegally in terminating Brown under E.O. 10450, which this Court has repeatedly held is inapplicable to employees who, like Brown, do not occupy national security-related positions.

The Secretary moved to dismiss or, in the alternative, for summary judgment.

The motion to dismiss asserted that Brown's claims were all barred because Brown had not exhausted E.E.O.C. remedies for federal employment-related race discrimination. The motion for summary judgment attacked the merits of each of Brown's claims, asserting that Brown had been justifiably terminated. In opposition to the latter motion, Brown presented evidence controverting nearly a dozen of The Secretary's allegedly undisputed facts, thus precluding summary judgment. However, the trial court granted the motion to dismiss, finding that all of Brown's claims were subject to E.E.O.C. exhaustion.

On appeal, Brown contested only dismissal of the Due Process claim, which was patently not subject to E.E.O.C. exhaustion. The Secretary conceded that

the trial court erred in dismissing the Due Process claim on E.E.O.C. exhaustion grounds, but proffered as an alternative ground for dismissal the new theory that the Due Process claim was preempted by the Civil Service Reform Act ("CSRA"). In reply, Brown noted that the District of Columbia Circuit has repeatedly held that equitable constitutional claims are **not** preempted by the CSRA, and urged the panel here to adopt that position both as better reasoned and because the D.C. Circuit's position is supported by this Court's precedent.

The panel in this case, bound by an earlier Ninth Circuit decision, rejected the D.C. Circuit rule cited by Brown and held that even equitable constitutional claims are preempted by the CSRA. Brown now seeks certiorari.

V. REASONS FOR GRANTING THE WRIT

At the outset, the contours of Brown's Due Process claim must be clarified. The sole basis for Brown's firing by the Mint was his "failure to cooperate in a security investigation, as required by E.O. 10450 for federal government employees." However, on its face, E.O. 10450 only applies to employees who "could bring about, by virtue of the nature of the position, a material adverse effect on the national security." E.O. 10450(3)(b), 18 Fed. Reg at 2489 (App. at 68 et seq.).

This Court has expressly held that E.O. 10450 is inapplicable to employees who, like Brown, who do not occupy sensitive positions involving national security, and that such employees have a Due Process claim if E.O. 10450 is applied

to them. Cole v. Young, 351 U.S. 536, 544 (1956) (E.O. 10450 can be applied only to employees whose "activities are directly concerned with the protection of the Nation from internal subversion or foreign aggression.") Moreover, the statement in the concurring opinion below that because Brown was a temporary employee he could not assert a Due Process claim for improper application of E.O. 10450[7] is in direct conflict with this Court's holding that temporary employees may bring a Due Process claim under these circumstances. *See* Vitarelli v. Seaton, 359 U.S. 535, 539 (1959). Certainly for purposes of this proceeding, Brown's Due Process claim is, and must be deemed to be, substantively

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7. *See* App. at 12-13 (concurring opinion of Holcomb-Hall, J.).

meritorious.[8]

A. The Ninth Circuit's position that the CSRA preempts equitable claims by federal employees is in conflict with the repeated and contrary holdings of the District of Columbia Circuit.

For over a decade, the District of Columbia Circuit has expressly and repeatedly held that the CSRA does **not** preempt claims by federal employees for equitable relief from constitutional violations that occur in the course of employment. *See* Borrell v. United States

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8. Parenthetically, the substantive merits of Brown's Due Process claim were attacked by the Secretary through a motion for summary judgment, filed with the motion to dismiss on preemption grounds. The trial court did not reach the summary judgment motion, and could not have granted it in any event since it was premised on nearly a dozen material facts which were disputed by Brown.

Int'l Comm. Agency, 682 F.2d 981, 989-90 (D.C. Cir. 1982); Cutts v. Fowler, 692 F.2d 138, 140-41 (D.C. Cir. 1982); Williams v. I.R.S., 745 F.2d 702, 705 (D.C. Cir. 1984); Hubbard v. U.S. E.P.A. Admin., 809 F.2d 1, 11 (D.C. Cir. 1986), *rehearing en banc granted on other grounds* 809 F.2d 15 (1986); Nat. Federation of Fed. Employees v. Weinberger, 818 F.2d 935, 940 (D.C. Cir. 1987); Spagnola v. Mathis, 859 F.2d 223, 229-230 (D.C. Cir. 1988) (*en banc*) ("time and again this court has affirmed the right of civil servants to seek equitable [relief] in vindication of their constitutional rights").[9]

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9. It should be noted that Spagnola is not just an en banc opinion, "it is an unanimous en banc opinion, a rare bird in any circuit." McIntosh v. Turner, 861 F.2d 524, 527 (8th Cir. 1988).

In holding that the CSRA does preempt equitable claims by federal employees, the appellate panel here expressly stated that it was bound by the holding to that effect in Saul v. United States, 928 F.2d 829, 843, n. 27 (9th Cir. 1991). App. at 10-11. However, as both the panel here and the panel in Saul expressly recognized, the Ninth Circuit's belief that the CSRA preempts equitable claims is in direct conflict with the District of Columbia Circuit's holdings that there is no such preemption. *See* Saul, 929 F.2d at 843, n. 27 (citing Spagnola v. Mathis, supra, as "*Contra*"); App. at 10-11 (conceding the conflict between the Spagnola and Saul). Indeed, the conflict between the Ninth and D.C. Circuits on this issue has been noted by other courts as well. *See* Bryant v. Cheney, 924 F.2d 525, 528 (4th Cir. 1991).

One of the primary bases for this Court's certiorari jurisdiction is the resolution of conflicts between the Circuit Courts of Appeal, McElroy v. United States, 455 U.S. 642, 643 (1982), particularly where the conflict between the Circuits is irreconcilable and the issue is an important question of statutory construction. *See, e.g.*, Shapiro v. United States, 335 U.S. 1, 4 (1948).

There is more than just a facial or minor conflict involved here. The issue sub judice is the extent of the justiciable rights of federal employees. The conflict between the Ninth Circuit and the D.C. Circuit on the question is complete, and irreconcilable. The issue has been considered by the D.C. Circuit on at least 6 occasions, by the Ninth Circuit

at least twice (here and in Saul), and by the Fourth Circuit at least twice as well. *See* Pinar v. Dole, 747 F.2d 899 (4th Cir. 1984) (CSRA preempts equitable claims); Bryant v. Cheney, supra, 924 F.2d at 528 (not reaching the issue because case could be decided on other grounds, but indicating that it would overturn Pinar and find no preemption). The conflict is sufficiently complete, and sufficiently important, that resolution by this Court is warranted.

The grant of certiorari is particularly appropriate where there is a need for "a uniform rule on the point." Commissioner v. Bilder, 369 U.S. 499, 501 (1962). The need for a uniform rule on the issue raised in the case at bar is patent. There are currently some 1,747,000 competitive service employees

and another 406,000 excepted service employees[10] who, because they are within the ambit of the CSRA, are directly affected by the conflicting decisions of the Ninth and D.C. Circuits. Unless this Court resolves the issue presented herein, an employee who brings an equitable action in the District of Columbia will be able to proceed, while an employee who brings an identical action anywhere within the Ninth Circuit will not. Such contrary results are incompatible with the overarching need for uniformity in federal question cases, particularly questions relating to federal employment law. Practically speaking, if this Court does not resolve the conflict between the Circuits, the result will be forum

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10. O.P.M. Overview Report, Central Personnel Data File, December, 1992.

shopping by aggrieved federal employees, who will, naturally, file in the District of Columbia. The District of Columbia courts will, in the end, bear alone a burden that would otherwise be spread among the district courts in 50 states. For this reason alone, the grant of certiorari is fully appropriate here. When the decision of the Ninth Circuit is viewed in the context of this Court's federal employment jurisprudence, the need for certiorari is compelling.

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B. The Ninth Circuit's pronouncements on the issue sub judice ignore both this Court's direct holding in an analogous case and this Court's apparent holding in an identical case.

In holding that equitable claims are preempted by the CSRA, he Ninth Circuit purports to be following this Court's precedent. Saul, 925 F.2d at 840-843, *citing* Schweiker v. Chiliki, 487 U.S. 412 (1988), United States v. Fausto, 484 U.S. 439 (1988) and Bush v. Lucas, 462 U.S. 412 (1983). The truth of the matter, however, is that the Ninth Circuit has simply ignored applicable precedent in order to reach its desired result. There are two decisions by this Court which simply belie the Ninth Circuit position. The first is a direct holding in a case with analogous administrative provisions involving the Central Intelligence Agency.

Employment decisions by the Director of the C.I.A. are, by statute, matters of essentially unlimited discretion. *See* 50 U.S.C. § 403(c) (director may fire any employee "whenever he shall deem such termination necessary or advisable in the interests of the United States.") In Webster v. Doe, 486 U.S. 592 (1988), a clerk-typist was fired by the C.I.A. because of his sexual orientation. The termination did not comply with the procedures set out in the CSRA. The employee brought claims for both violation of the provisions of the CSRA and for equitable relief as to constitutional violations. The Director argued that the discretion afforded him by 50 U.S.C. § 403(c) preempted administrative/ judicial review of his actions even when such review was otherwise provided for under

the CSRA. The Court agreed. Webster v. Doe, supra, 486 U.S. at 600-601. However, the Court expressly rejected the Director's argument that the employee's claims for equitable relief, premised on Due Process violations were likewise preempted, because of the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claims." Webster, supra, 486 U.S. at 603, quoting Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681, n. 12 (1986).

Webster holds that even the extensive discretion which national security statutes expressly establish for C.I.A. employment decisions cannot preclude equitable constitutional claims by employees. The holding in Webster cannot

be reconciled with the Ninth Circuit's decision that the far less imperative needs underlying the CSRA preempt such claims.

Nor can it be claimed that the Court below could have believed Webster is inapplicable to the question here; such a claim is untenable given this Court's subsequent jurisprudence. As noted earlier, the Fourth Circuit initially held, like the Ninth Circuit here, that the CSRA preempts equitable constitutional claims. Pinar v. Dole, supra, 747 F.2d at 912. Later, a trial court dismissed a federal employee's equitable claims in reliance on Pinar's holding that such claims are preempted. The Fourth Circuit affirmed on appeal. *See* Bryant v. Carlucci, 838 F.2d 465 (4th Cir. 1987). However, that judgment was vacated by this

Court, which expressly remanded the case for "reconsideration in light of Webster v. Doe." Bryant v. Carlucci, 488 U.S. 806 (1988).

With its summary reversal in Bryant v. Carlucci, this Court made plain that Webster controls the question of CSRA preemption of equitable claims.[11] This was repeatedly pointed out to the Ninth Circuit in the case at bar[12], to no avail. Bluntly, the court below preferred its own precedent in Saul to the holding of this Court in Webster and, later, in Bryant v. Carlucci. Ordinarily, the appropriate

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11. The fact that Bryant v. Carlucci, supra, was a summary disposition does not mean that it can be blithely ignored by the Ninth Circuit. Hicks v. Miranda, 422 U.S. 332, 344 (1975) ("lower courts are bound by summary decisions by this Court.")

12. *See* Appellant's Reply Brief at 11-12; Petition for Rehearing at 7-10.

response by this Court would be summary reversal. *See, e.g.*, S.E.C. v. Otis & Co., 338 U.S. 843 (1949). However, because the decision below is unpublished, summary reversal will not provide the direct precedent apparently necessary to bring the Ninth Circuit into line with this Court's views.

The Fourth Circuit recognizes that this Court's decisions in Webster v. Doe, supra, and Bryant v. Carlucci preclude finding CSRA preemption of equitable claims, while the Ninth Circuit seems to believe that they do not. As discussed above, the issue here is recurrent and of considerable importance. Given the Ninth Circuit's apparent reluctance to accept this Court's pronouncements on the issue, full consideration and decision is the best way to end the apparently "discordant

views in the Circuits regarding the proper application [of Webster and Bryant]." United States v. Gaddis, 424 U.S. 544, 547 (1976).

VI. CONCLUSION

The issue presented, which involves the rights of all federal employees and jurisdiction of all federal courts, is one of national scope. It is by nature a question where uniformity of decision is of great importance and the same question has repeatedly been before the lower courts. The decision of the Ninth Circuit in the case at bar is in complete conflict with the repeatedly reaffirmed holdings of the District of Columbia Circuit on precisely the same issue, and is also in apparently direct conflict with this Court's precedent.

For all of the above-stated reasons, petitioner Wilbur Brown respectfully requests that a writ of certiorari issue, and that the decision of the Ninth Circuit be subject to full consideration and appropriate disposition by this Court.

Respectfully Submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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ORDER DENYING PETITION
FOR REHEARING EN BANC
Ninth Circuit Court of Appeal
Case No. 91-15006

The "Petition For Rehearing En Banc" shall be treated as a petition for rehearing and a suggestion for a rehearing en banc. The panel has voted to deny the petition for a rehearing. Judge Hall voted to reject the suggestion for reconsideration en banc. Judge Alarcon and Judge Dwyer so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Fed. R. 35(b)

The petition for rehearing is denied and the suggestions for rehearing en banc is rejected.

Memorandum Decision of the
Ninth Circuit Court of Appeal
Case No. 91-15006

Before: ALARCON and HALL, Circuit Judges, and DWYER, District Judge.

Plaintiff-Appellant Wilbur Brown appeals from the order dismissing his action for wrongful termination from the Department of the Treasury on the ground that his claims were preempted by Title VII. Brown contends that the district court erred in dismissing his action because he was not required to exhaust his claims under Title VII before pursuing an action for violation of his Fifth Amendment due process rights. Brown also contends that the district court's error requires reversal because he has a valid due process claim that is not preempted by the Civil Service Reform Act of 1978, Pub. L. 950454, 92 Stat. 11 et seq. (codified

as amended in various sections of 5 U.S.C.) (CSRA).

I.

On June 27, 1987, Wilbur Brown began work at the United States Mint as a Metal Forming Machine Operator, grade WG-3, serving a one-year appointment. On December 6, 1987, Brown received a new appointment as a Temporary Forming Machine Operator, grade WG-6, which was to expire on December 6, 1988. During his employment, Brown periodically complained to his supervisors about pervasive racial discrimination at the United States Mint.

In May, 1988, United States Mint security personnel, having learned that eight years previously Brown had been tried and acquitted of first-degree murder charges, questioned Brown about the murder charges. United States Mint security

personnel told Brown that he would immediately have to answer, in writing, a set of written questions regarding the incident. Brown refused.

Brown continued his complaints to his superiors about workplace discrimination, and also complained that other employees of the United States Mint, who were actually convicted felons, had never been asked any questions about the crimes for which they had been convicted.

On August 17, 1988, the United States Mint terminated Brown for failure to cooperate in the security investigation regarding the murder charges. When Brown was terminated, his supervisor handed him forms for an appeal to the Merit Systems Protection Board (MSPB).

Brown appealed his discharge to the MSPB, alleging, inter alia, that his

discharge was motivated by racial discrimination. The administrative law judge dismissed the claim, holding that Brown's status as a temporary employee precluded the Board from exercising jurisdiction.

Brown then filed a complaint in federal district court. The first four claims for relief alleged that Brown had been discharged because of his race in violation of 42 U.S.C. 2000e-16 or in retaliation for whistle blowing. The fifth claim for relief alleged a violation of Brown's right to procedural due process and the sixth count sought an equitable remedy -- reinstatement -- for all claims presented.

The district court dismissed the complaint on the ground that Title VII of the Civil Rights Act of 1964, as amended,

42 U.S.C. 2000e-16, provides the sole remedy for racial discrimination i the federal workplace. The court held that Brown's claims, including his due process claim, arose from the same operative facts involving charges of employment discrimination, and were therefore precluded by his failure to exhaust his Title VII administrative remedies. Brown filed a timely notice of appeal to this court.

II.

The existence of jurisdiction is a question of law which we review de novo. United States v. Moncini, 882 F.2d 401, 403 (9th Cir. 1989).

On appeal, Brown has abandoned his Title VII employment discrimination claims, arguing only that neither Title VII nor CSRA preempts his due process

claim against the United States Mint. The Secretary argues that even if Title VII does not preempt Brown's due process claim, the claim must still be dismissed for lack of subject matter jurisdiction because the exclusive remedial scheme of CSRA preempts judicial consideration of any challenge by a federal employee, including an equitable constitutional challenge, to federal personnel decisions.

This court "may affirm the district court on any ground supported by the record, even if the ground is not relied on by the district court." Charley's Taxi Radio Dispatch v. SIDA of Hawaii, 810 F.2d 869, 874 (9th Cir. 1987). Because we hold that CSRA preempts Brown's claim, we need not reach the question of Title VII preemption.

Brown argues, first, that the

Secretary initially raised the CSRA preemption argument only in his reply memorandum below, and that therefore this court should refuse to consider it. The argument is meritless. "A party may question the existence of subject matter jurisdiction at any time during the proceedings." Building Material & Dump Truck Drivers, Local 420 v. Traweek, 879 F.2d 500, 505 (9th Cir. 1989).

Both parties agree that Brown, as a temporary federal employee, is specifically excluded from CSRA's judicial review provisions. Brown argues that because he is without any remedies under CSRA -- administrative or judicial -- he is outside the ambit of CSRA entirely and cannot be preempted by any of its provisions. The law is to the contrary. The exclusion of a class of federal

employees from the judicial review provisions of Chapter 75 of CSRA represents "a clear congressional intent to deny the excluded employees the protections of Chapter 75 -- including judicial review -- for personnel action covered by that chapter." United States v. Fausto, 484 U.S. 439, 447 (1987). Furthermore, the absence of remedies under CSRA is irrelevant to CSRA preemption of judicial review. Saul v. United States, 928 F.2d 829, 839-40 (9th Cir. 1991).

Brown's argument turns CSRA on its head. He suggests that CSRA's statutory scheme allows temporary employees immediate access to the federal district courts for their unconstitutional discharge claims while permanent employees must seek administrative review through the MSPB for identical claims with

judicial review available only in the Federal Circuit. 5 U.S.C. 7513(d), 7703. Brown's logic undermines "the preferred position of certain categories of employees" under CSRA and drains the MSPB of its "primacy . . . for administrative resolution of disputes over adverse personnel action." Fausto, 484 U.S. at 449.

Brown next argues that even if CSRA applies to him, it preempts only constitutional tort claims for damages (Bivens claims), not constitutional claims seeking equitable remedies such as reinstatement. As Brown acknowledges, this court has already held that CSRA preempts equitable constitutional claims. Saul v. United States, 928 F.2d at 843. Nevertheless Brown urges us to reject Saul as poorly reasoned and adopt the approach

of the District of Columbia Circuit, which finds no CSRA preemption of constitutional claims seeking equitable relief. Spagnola v. Mathis, 859 F.2d 223, 220-30 (D.C. Cir. 1988).

Only an en banc court of this circuit may overrule our precedent absent an intervening Supreme Court decision or act of Congress. United States v. Frank, 933 F.2d 1491, 1500 (9th Cir.), superseded on other grounds, 956 F.2d 872 (9th Cir. 1991), cert. denied, 61 U.S.L.W. 3283 (U.S. Oct. 13, 1992) (No. 91-8230); Pratt v. McCarthy, 850 F.2d 590, 593 (9th Cir. 1988). As Brown himself recognizes, Saul controls this case. The complaint must be dismissed.

AFFIRMED.

Concurring Opinion of HALL, Circuit Judge

Brown argues in this appeal that neither Title VII nor the Civil Service Reform Acts ["CSRA"] preempts his due process claim against the United States Mint. I believe we need not decide the difficult jurisdictional questions that argument raises, nor the applicability here of Saul v. United States, because Brown's due process claim is untenable. See Federal Insurance Co. v. Scarsella Bros. Inc., 931 F.2d 599, 602 (9th Cir. 1991) ("Where an appeal presents difficult questions concerning jurisdiction, we may forego the resolution of such issues if the merits of the appeal are insubstantial.") Thus, I would affirm the district court's dismissal for failure to state a claim on the grounds that Brown can prove no set of facts in support of

his due process claim.

In order to establish a claim under the Fifth Amendment Due Process Clause, Brown must show that he had either a liberty or property interest in his continued employment that was subject to procedural protections. He concedes that he did not allege any facts demonstrating that his dismissal from the Mint violated a protected liberty interest. And as a temporary employee specifically subject to summary dismissal at any time, Brown had no entitlement to continue employment at the Mint, and must has no basis for claiming a protected property interest.

I concur in the panel's decision to affirm the district court's dismissal of this action, but on the ground stated above.

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ORDER OF DISMISSAL
Opinion by Patel, J.
United States District Court
Northern District of California
Case No. C-89-0102-MHP

Defendant's motion to dismiss or for summary judgment came on for hearing before this Court on Monday, September 24, 1990, pursuant to notice duly given. At the hearing, plaintiff was represented by his attorney Elizabeth A. Principato-Phipps, and defendant was represented by Assistant United States Attorney Beth McGarry.

The Court has considered the first amended complaint on file herein, together with the written memoranda and oral argument submitted by counsel in connection with this motion and, where appropriate, the evidence properly before the Court. The Court also has conducted its own research into the applicable law

regarding the issues raised by this action and the defendant's motion to dismiss. For the reasons set forth below and in this court's bench order, the Court has concluded that defendant's motion is well taken and should be granted in its entirety. Because the Court is granting defendant's motion to dismiss, it denies plaintiff's motion to compel discovery and award sanctions and grants defendant's motion to stay discovery.

Plaintiff seeks redress for alleged discrimination in federal employment based on race and color. In addition to seeking relief herein pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16, plaintiff also asserts causes of action, arising out of the same operative facts, based on claims that defendant's actions violated the Fifth

Amendment and 5 U.S.C. 2302 and 7532, and perhaps other statutes as well. Title VII, however, provides the exclusive remedy available to federal employees complaining of employment discrimination based on, inter alia, race or color, and thus Title VII is preemptive of any other federal law concerning discrimination based on any of the factors set forth in Title VII. Brown v. General Services Administration, 425 U.S. 810 (1976). Therefore, to the extent plaintiff's first amended complaint seeks to assert any claim other than pursuant to Title VII, it must be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Similarly, plaintiff's request for punitive damages and other relief not available under Title VII also must be

dismissed for the same reason.

Plaintiff failed to exhaust administrative remedy as to any of his discrimination claims. As to the claim arising out of his discharge, plaintiff failed to exhaust in a timely manner his administrative remedies for allegations of discrimination. Defendant discharged plaintiff on August 17, 1988. Plaintiff, with the assistance of counsel, filed an appeal of his dismissal to the Merits System Protection Board on August 25, 1988. This initial appeal was devoid of any allegation of race discrimination. Two months after his discharge, plaintiff raised, for the first time, an allegation of race discrimination in an amended appeal filed with the Merits System Protection Board. On December 16, 1988, the Merits System Protection Board

dismissed plaintiff's appeal for lack of jurisdiction. Plaintiff, as a temporary employee, was not entitled to appeal his removal to the Board. Only an individual who meets the definition of an "employee" under 5 U.S.C. 7511(a)(1) is entitled to appeal a removal to the Merits System Protection Board. 5 U.S.C. 7513(d) and 7701(a). Plaintiff did not initiate a complaint through the agency's EEO process to complain that his removal was based on prohibited discrimination. When this appeal was dismissed by the Merits System Protection Board for lack of jurisdiction, plaintiff brought this action in District Court.

This is not a "mixed case" as defined by 5 U.S.C. 7702. Dismissal by the MSPB for lack of jurisdiction does not avoid the procedural requirements for bringing a

Title VII action against the federal defendant. Plaintiff must timely exhaust his administrative remedies before coming into Federal court. In this case, plaintiff made no attempt to proceed through the EO Counselor or pursue agency procedures. He made no attempt to state a claim of discrimination until well after the required period had expired.

As to all of plaintiff's claims arising out of alleged discriminatory acts or practices occurring prior to plaintiff's discharge, the court concludes that dismissal is appropriate because plaintiff failed to initiate any attempt to exhaust his administrative remedies with respect to those claims. In that regard, plaintiff's first amended complaint and his declaration submitted in opposition to defendant's motions are

devoid of nay allegation which would explain or excuse his failure to initiate the administrative EEO remedy process. Therefore, relief may not be granted on those claims, and the Court lacks subject matter jurisdiction over them.

Accordingly, defendant's motion is granted in its entirety and this action is dismissed with prejudice.

5 U.S.C. 701 et seq.

701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that-

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter-

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include-

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of

the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50,

appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim than an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the

United States or that the United States is an indispensable party. The Untied States may be named as a defendant in any such action, and a judgment or decree may be entered against the United Stated: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable grounds; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial

enforcement.

704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency

authority.

705. Relief pending review

When an agency finds that justice so required, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

706. Scope of review

To the extent necessary to decision and when presented, the reviewing court

shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall-

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory

jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of

prejudicial error.

5 U.S.C. 2301 et. seq.

2301. Merit system principles

(a) This section shall apply to-

(1) an Executive agency; and

(2) the Government Printing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which

assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be-

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences-

(A) a violation of any law, rule, or regulation, or

(B) mismanagement, a gross waste of funds, an abuse of

authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter-

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules,

regulations, or directives;

which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section-

(A) "personnel action" means-

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; and

(x) any other significant change in duties or responsibilities which is

inconsistent with the employee's salary or grade level;

(B) "covered position" means any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include-

(i) a position which is excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) any position excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of

good administration.

(C) "agency" means an Executive agency and the Government Printing Office, but does not include-

(i) a Government corporation;

(ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, any Executive agency or unity thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or

(iii) the General Accounting Office.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority-

(1) discriminate for or against any employee or applicant for employment-

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of

the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of-

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for

employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuries the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian

position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of-

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the

Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences-

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waster of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee

or applicant for employment because of-

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States; or

(11) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained

in section 2301 of this title.

This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management. Any individual to whom the head of any agency delegated authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any

effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under-

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the

Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

2303. Prohibited personnel practices in the Federal Bureau of Investigation

(a) Any employee of the Federal Bureau of Investigation who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or fail to take a personnel action with respect to any employee of the Bureau as a reprisal for a disclosure of information by the employee to the Attorney General

(or an employee designated by the Attorney General for such purpose) which the employee or applicant reasonably believes evidences-

(1) violation of any law, rule, or regulation, or

(2) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

For the purpose of this subsection, "personnel action" means any action described in clauses (i) through (x) of section 2302(a)(2)(A) of this title with respect to an employee in, or applicant for, a position in the Bureau (other than a position of a confidential, policy-determining, policymaking, or policy-advocating character).

(b) The Attorney General shall

prescribe regulations to ensure that such a personnel action shall not be taken against an employee of the Bureau as a reprisal for any disclosure of information described in subsection (a) of this section.

(c) The President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214 and 1221 of this title.

2304. Responsibility of the General Accounting Office

(a) If requested by either House of Congress (or any committee thereof), or if considered necessary by the Comptroller General, the General Accounting Office shall conduct audits and reviews to assure compliance with the laws, rules, and regulations governing employment in the

executive branch and in the competitive service and to assess the effectiveness and soundness of Federal personnel management.

(b) The General Accounting Office shall prepare and submit an annual report to the President and the congress on the activities of the Merit Systems Protection Board and the Office of Personnel Management. The report shall include a description of-

(1) significant actions taken by the Board to carry out its functions under the title; and

(2) significant actions of the Office of Personnel Management, including an analysis of whether or not the actions of the Office are in accord with merit system principles and free from prohibited personnel

practices.

2305. Coordination with certain other provisions of law

No provision of this chapter, or action taken under this chapter, shall be construed to impair the authorities and responsibilities set forth in Section 102 of the National Security Act of 1947 (61 Stat. 495; 50 U.S.C. 403), the Central Intelligence Agency Act of 1949 (63 Stat. 208; 50 U.S.C. 403a and following), the Act entitled "An Act to provide certain administrative authorities for the National Security Agency, and for other purposes," approved May 29, 1959 (73 Stat. 63; 50 U.S.C. 402 note), and the Act entitled "An Act to amend the Internal Security Act of 1950)", approved March 26, 1964 (78 Stat. 168; 50 U.S.C. 831-835).

5 U.S.C. 7501 et. seq.

7501. Definitions

For the purpose of this subchapter-

(1) "employee" means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; and

(2) "suspension" means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

7502. Actions covered

This subchapter applies to a suspension for 14 days or less, but does not apply to a suspension under section 7521 or 7532 of this title or any action initiated under section 1215 of this

title.

7503. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).

(b) An employee against whom a suspension for 14 days or less is proposed is entitled to-

(1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish

affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

7504. Regulations

The Office of Personnel Management

may prescribe regulations to carry out the purpose of this subchapter.

7511. Definitions; application

(a) For the purpose of this subchapter-

(1) "employee" means-

(A) an individual in the competitive service-

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has

completed 1 year of current continuous service in the same or similar positions-

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Rate Commission; and

(C) an individual in the excepted service (other than a preference eligible)-

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the

same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee-

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by-

(A) the President for a position that the President has excepted from the competitive service; or

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive

service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;

(5) who is described in section 8337(h)(1), relating to technicians in the National Guard;

(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency or the General Accounting Office;

(8) whose position is within the

United States Postal Service, the Postal Rate Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, the National Security Agency, the Defense Intelligence Agency, or an intelligence activity of a military department covered under section 1590 of title 10, unless subsection (a)(1)(B) of this section or section 1005(a) of title 39 is the basis for this subchapter's applicability;

(9) who is described in section 5102(c)(11) of this title; or

(10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such

employee was appointed to such position under section 7401(3) of such title.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

7512. Actions covered

This subchapter applies to-

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to-

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to-

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by

regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

7514. Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter, except as it concerns any matter with respect to which the Merit Systems Protection Board may prescribe regulations.

EXECUTIVE ORDER 10450
SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, or good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair,

impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention in employment of persons in the Federal service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including section 1753 of the Revised Statutes of the United States (5 U.S.C. 631); the Civil Service Act of 1883 (22 Stat. 403; 5 U.S.C. 732, et seq.); section 9A of the act of August 2, 1939, 53 Stat. 1148 (5 U.S.C. 118 j); and the act of

August 26, 1950, 64 Stat. 476 (5 U.S.C. 22-1 et seq.), and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

SECTION 1. In addition to the departments and agencies specified in the said act of August 26, 1950, and Executive Order No. 10237 of April 26, 1951, the provisions of that act shall apply to all other departments and agencies of the Government.

SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within

the department or agency is clearly consistent with the interests of the national security.

SEC. 3. (a) The appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation. The scope of the investigation shall be determined in the first instance according to the degree of adverse effect the occupant of the position sought to be filled could bring about, by virtue of the nature of the position, on the national security, but in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and

supervisors, references, and schools attended by the person under investigation: *Provided,* that upon request of the head of the department or agency concerned, the civil Service Commission may, in its discretion, authorize such less investigation as may meet the requirements of the national security with respect to per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside the United States. Should there develop at any stage of investigation information indicating that the employment of any such person may not be clearly consistent with the interests of the national security, there shall be conducted with respect to such person a full field investigation, or such less investigation as shall be sufficient to enable the head of the

department or agency concerned to determine whether retention of such person is clearly consistent with the interests of the national security.

(b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. Any position so designated shall be filled or occupied only by a person with respect to whom a full field investigation has been conducted: *Provided,* that a person occupying a sensitive position at the time it is designated as such may continue to occupy such position pending the completion of a full field investigation, subject to the

other provisions of this order: *And provided further,* that in case of emergency a sensitive position may be filled for a limited period by a person with respect to whom a full field pre-appointment investigation has not been completed if the head of the department or agency concerned finds that such action is necessary in the national interest, which finding shall be made a part of the records of such department or agency.

SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause

to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not bee adjudicated under a security standard commensurate with that established under this order.

SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case

of such officer or employee.

SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the

said act of August 26, 1950.

SEC. 7. Any person whose employment is suspended or terminated under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950, or pursuant to the said Executive Order No. 9835 or any other security or loyalty program relating to officers or employees of the Government, shall not be reinstated or restored to duty or reemployed in the same department or agency and shall not be reemployed in any other department or agency, unless the head of the department or agency concerned finds that such reinstatement, restoration, or reemployment is clearly consistent with the interests of the national security, which finding shall be made a part of the records of such department or agency:

Provided, that no person whose employment has been terminated under such authority thereafter may be employed by any other department or agency except after a determination by the Civil Service Commission that such person is eligible for such employment.

SEC. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall not be limited, to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy.

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, or sexual perversion.

(iv) An adjudication of insanity, or treatment for serious mental or neurological disorder without satisfactory evidence of cure.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the

national security.

(2) Commission of any act of sabotage, espionage, treason, or sedition, or attempts thereat or preparation therefor, or conspiring with, or aiding or abetting, another to commit or attempt to commit any act of sabotage, espionage, treason, or sedition.

(3) Establishing or continuing a sympathetic association with a saboteur, spy, traitor, or with an espionage or other secret agent or representative of a foreign nation, or any representative of a foreign nation whose interests may be inimical to the interests of the United States, or with any person who advocates the use of force or violence to overthrow the government of the United States or the alteration of the form of government of the United States by unconstitutional

means.

(4) Advocacy of use of force or violence to overthrow the government of the United States, or of the alteration of the form of government of the United States by unconstitutional means.

(5) Membership in, or affiliation or sympathetic association with, any foreign or domestic organization, association, movement, group, or combination of persons which is totalitarian, Fascist, Communist, or subversive, or which has adopted, or shows, a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or which seeks to alter the form of government of the United States by unconstitutional means.

(6) Intentional, unauthorized

disclosure to any person of security information, or of other information disclosure of which is prohibited by law, or willful violation or disregard of security regulations.

(7) Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(b) The investigation of persons entering or employed in the competitive service shall primarily be the responsibility of the Civil Service Commission, except in cases in which the head of a department or agency assumes that responsibility pursuant to law or by agreement with the Commission. The Commission shall furnish a full investigative report to the department or

agency concerned.

(c) The investigation of persons (including consultants, however employed), entering employment of, or employed by, the Government other than in the competitive service shall primarily be the responsibility of the employing department or agency. Departments and agencies without investigative facilities may use the investigative facilities of the Civil Service Commission, and other departments and agencies may use such facilities under agreement with the Commission.

(d) There shall be referred promptly to the Federal Bureau of Investigation all investigations being conducted by any other agencies which develop information indicating that an individual may have been subjected to coercion, influence, or pressure to act contrary to the interests

of the national security, or information relating to any of the matters described in subdivisions (2) through (7) of subsection (a) of this section. In cases so referred to it, the Federal Bureau of Investigation shall make a full field investigation.

SEC. 9. (a) There shall be established and maintained in the Civil Service Commission a security-investigations index covering all persons as to whom security investigations have been conducted by any department or agency of the Government under this order. The central index established and maintained by the Commission under Executive Order No. 9835 of March 21, 1947, shall be made a part of the security-investigations index. The security-investigations index shall contain the name of each person

investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted an investigation concerning the person involved or has suspended or terminated the employment of such person under the authority granted to heads of departments and agencies by or in accordance with the said act of August 26, 1950.

(b) The heads of all departments and agencies shall furnish promptly to the Civil Service Commission information appropriate for the establishment and maintenance of the security-investigations index.

(c) The reports and other investigative material and information developed by investigations conducted pursuant to any statute, order, or program

described in section 7 of this order shall remain the property of the investigative agencies conducting the investigations, but may, subject to considerations of the national security, be retained by the department or agency concerned. Such reports and other investigative material and information shall be maintained in confidence, and no access shall be given thereto except, with the consent of the investigative agency concerned, to other departments and agencies conducting security programs under the authority granted by or in accordance with the said act of August 26, 1950, as may be required for the efficient conduct of Government business.

SEC. 10. Nothing in this order shall be construed as eliminating or modifying in any way the requirement for any

investigation or any determination as to security which may be required by law.

SEC. 11. On and after the effective date of this order the Loyalty Review Board of March 21, 1947, shall not accept agency findings for review, upon appeal or otherwise. Appeals pending before the Loyalty Review Board on such date shall be heard to final determination in accordance with the provisions of the said Executive Order No. 9835, as amended. Agency determinations favorable to the officer or employee concerned pending before the Loyalty Review Board on such date shall be acted upon by such Board, and whenever the Board is not in agreement with such favorable determination the case shall be remanded to the department or agency concerned for determination in accordance with the standards and procedures

established pursuant to this order. Cases pending before the regional loyalty boards of the Civil Service Commission on which hearings have not been initiated on such date shall be referred to the department or agency concerned. Cases being heard by regional loyalty boards on such date shall be heard to conclusion, and the determination of the board shall be forwarded to the head of the department or agency concerned: *Provided*, that if no specific department or agency is involved, the case shall be dismissed without prejudice to the applicant. Investigations pending in the Federal Bureau of Investigation or the Civil Service Commission on such date shall be completed and the reports thereon shall be made to the appropriate department or agency.

SEC. 12. Executive Order No. 9835 of March 21, 1947, as amended, is hereby revoked. For the purposes described in section 11 hereof the Loyalty Review Board and the regional loyalty boards of the Civil Service Commission shall continue to exist and function for a period of one hundred and twenty days from the effective date of this order, and the Department of Justice shall continue to furnish the information described in paragraph 3 of Part III of the said Executive Order No. 9835, but directly to the head of each department and agency.

SEC. 13. The Attorney General is requested to render to the heads of departments and agencies such advice as may be requisite to enable them to establish and maintain an appropriate employee-security program.

SEC. 14. (a) The Civil Service Commission, with the continuing advice and collaboration of representatives of such departments and agencies as the National Security Council may designate, shall make a continuing study of the manner in which this order is being implemented by the departments and agencies of the Government for the purpose of determining:

(1) Deficiencies in the department and agency security programs established under this order which are inconsistent with the interests of, or directly or indirectly weaken, the national security.

(2) Tendencies in such programs to deny to individual employees fair, impartial, and equitable treatment at the hands of the Government, or rights under the Constitution and laws of the United Stated or this order.

Information affecting any department or agency developed or received during the course of such continuing study shall be furnished immediately to the head of the department or agency concerned. The Civil Service Commission shall report to the National Security Council, at least semiannually, on the results of such study, and shall recommend means to correct any such deficiencies or tendencies.

(b) All departments and agencies of the Government are directed to cooperate with the Civil Service Commission to facilitate the accomplishment of the responsibilities assigned to it by subsection (a) of this section.

SEC. 15. This order shall become effective thirty days after the date hereof.

(3)

No. 92-1838

FILED
JUL 26 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILBUR BROWN, PETITIONER

v.

LLOYD BENTSEN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, which comprehensively addresses federal employment disputes, precludes petitioner from seeking other remedies for termination of his temporary appointment.

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LLOYD BENTSEN, SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-13) is not reported, but the decision is noted at 979 F.2d 854 (Table). The opinion of the district court (Pet. App. 14-20) is not reported.

JURISDICTION

The court of appeals entered its decision on November 18, 1992, and it denied a petition for rehearing on January 14, 1993. See Pet. App. 1. The petition for a writ of certiorari was filed on April 13, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, establishes a comprehensive scheme for adjudicating federal employee challenges

to agency employment decisions. The CSRA specifically provides that if an agency discharges a worker who meets the definition of "employee" in 5 U.S.C. 7511(a)(1)(A), the worker may appeal his dismissal to the Merit Systems Protection Board (MSPB), 5 U.S.C. 7701(a), and may seek judicial review of the MSPB's decision, 5 U.S.C. 7703. That statutory procedure precludes resort to other remedies. See *United States* v. *Fausto*, 484 U.S. 439, 446-447 (1988); *Bush* v. *Lucas*, 462 U.S. 367 (1983).

The Office of Personnel Management (OPM) allows federal agencies to hire temporary workers in certain circumstances. See 5 C.F.R. 316.401. A worker serving a temporary appointment in the competitive service is not, however, an "employee" within the meaning of Section 7511(a)(1)(A) of the CSRA, and hence is not entitled to the MSPB and judicial remedies available to those persons. See *Antolin* v. *Department of Justice*, 895 F.2d 1395, 1397 (Fed. Cir. 1989), cert. denied, 498 U.S. 868 (1990).[1]

2. Petitioner is an African-American male who was employed at the United States Mint in San Francisco. C.A. Exc. Rec. Exh. D at 3. On July 27, 1987, petitioner was hired as a trainee Metal Forming Machine Operator under a temporary appointment scheduled to expire on July 26, 1988. C.A. Supp. Exc.

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[1] The CSRA defines the term "employee" in relevant part as "an individual in the competitive service * * * who has completed 1 year of current continuous employment under other than a temporary appointment limited to 1 year or less." 5 U.S.C. 7511(a)(1)(A). The court in *Antolin* ruled that "[u]nder the plain language of the statute, even when an individual serves a series of temporary appointments of one year or less, that individual does not become an employee for the purpose of § 7511(a)(1)." 895 F.2d at 1397.

Rec. 1. Petitioner completed his training a few months later. On December 6, 1987, he was hired as a Metal Forming Machine Operator under a second temporary appointment scheduled to expire on December 5, 1988. *Id.* at 2. The form authorizing petitioner's appointments stated that "THIS APPOINTMENT MAY BE TERMINATED AT ANY TIME IF YOUR SERVICES ARE NO LONGER NEEDED OR FUNDS ARE NOT AVAILABLE." *Id.* at 1, 2 (capitalization in original). See Pet. App. 3.

The United States Mint initiated a routine background investigation, known as a National Agency Check and Inquiries, to assist the agency in determining petitioner's suitability for employment. The preliminary report revealed that several years earlier petitioner had been tried for and acquitted of murder. C.A. Supp. Exc. Rec. 3. Police records indicated that petitioner had acknowledged at trial that he fired the fatal shot, but he had denied that he had intended to kill the victim. *Id.* at 6. The Mint's Chief of Security/Internal Review instructed Mint security personnel to interview petitioner concerning the incident, but on the advice of counsel, petitioner declined to answer questions. *Id.* at 3, 4, 7. On August 17, 1988, petitioner was dismissed from his position for "failure to cooperate in a security investigation." *Id.* at 10.

3. Petitioner appealed his dismissal to the MSPB and subsequently amended his appeal to allege, *inter alia*, discrimination based on race. On December 16, 1988, the MSPB Administrative Judge dismissed the appeal on the ground that the MSPB lacked jurisdiction over his claim. The judge concluded that petitioner did not qualify as an "employee" under 5

U.S.C. 7511(a)(1)(A), because he was serving in a temporary appointment. C.A. Supp. Exc. Rec. 12-13.

Petitioner subsequently filed suit in federal district court. The first four claims of petitioner's amended complaint alleged that he had been discharged because of his race and/or in retaliation for his prior complaints regarding alleged racial discrimination at the United States Mint. The fifth claim alleged that "the U.S. Mint has violated [petitioner's] procedural due process rights afforded under the Fifth Amendment to the United States Constitution and 5 U.S.C. § 7532." C.A. Exc. Rec. Exh. D at 10. The district court dismissed the complaint in its entirety. Pet. App. 14-20.[2]

Petitioner appealed and challenged the dismissal of his procedural due process claim. The court of appeals affirmed. Relying on its prior decision in *Saul* v. *United States*, 928 F.2d 829 (9th Cir. 1991), the court held that the CSRA's comprehensive remedial scheme precluded petitioner's due process claim. The court explained that

> [petitioner's] argument turns CSRA on its head. He suggests that CSRA's statutory scheme allows temporary employees immediate access to the federal district courts for their unconstitutional discharge claims while permanent

[2] Petitioner appears to have abandoned his reliance on 5 U.S.C. 7532. Section 7532 applies when the government invokes national security concerns for expedited suspension or dismissal of an employee who would otherwise be entitled to more extensive procedural protections. But Section 7532 procedures need not be followed when, as here, the agency is authorized to terminate an employee summarily without reference to national security. See *Carlucci* v. *Doe*, 488 U.S. 93, 100, 102 (1988).

> employees must seek administrative review through the MSPB for identical claims with judicial review available only in the Federal Circuit. 5 U.S.C. 7513(d), 7703. Brown's logic undermines "the preferred position of certain categories of employees" under CSRA and drains the MSPB of its "primacy . . . for administrative resolution of disputes over adverse personnel action." *Fausto*, 484 U.S. at 449.

Pet. App. 9-10. The court also rejected petitioner's contention that the CSRA should not preclude his claim for equitable relief from an alleged constitutional violation, noting that the argument was contrary to circuit precedent. *Id.* at 10.

Judge Hall separately concurred, stating that affirmance was appropriate without regard to the preclusive effect of the CSRA, "because [petitioner's] due process claim is untenable." Pet. App. 12. She explained that petitioner's Fifth Amendment claim could not succeed unless petitioner had possessed a liberty or property interest in continued government employment. Petitioner had alleged no facts demonstrating that his dismissal had deprived him of a liberty interest, and, as a temporary employee, petitioner had no property interest in retaining his job. Pet. App. 13.

ARGUMENT

1. The court of appeals correctly concluded that the CSRA precludes the relief petitioner seeks on his employment claims. The CSRA provides for review of final decisions of the MSPB in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703. A prerequisite to Federal Circuit review, however, is that the MSPB must itself have juris-

diction over a plaintiff's challenge. In the present case, the Administrative Judge correctly held that the Board lacked jurisdiction, explaining that "[a]n 'employee' who may appeal a separation or removal to the Board is defined, in relevant part, as 'an individual in the competitive service . . . who has completed 1 year [of] current continuous employment *under other than a temporary appointment limited to 1 year or less*.'" C.A. Supp. Exc. Rec. 12-13 (quoting 5 U.S.C. 7511(a)(1)(A)) (emphasis and ellipsis in Administrative Judge's opinion). The CSRA provides petitioner with no right of judicial review of the claims he asserts here and, by necessary implication, precludes relief through other statutory mechanisms, including the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See Pet. 4 n.1.[3]

This Court has emphasized that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action." *Fausto*, 484 U.S. at 444. The exclusion of certain workers (including temporary workers such as petitioner) from the definitional

[3] In the court of appeals, petitioner conceded that the Administrative Judge was correct in holding that the MSPB lacked jurisdiction. See Appellant's C.A. Br. 6 ("The MSPB judge found, correctly, that [petitioner] was a temporary employee whose claims were not within the jurisdiction of the MSPB."). If petitioner had wished to contest that holding, the proper course would have been to file a petition for review to the Board and/or an appeal to the United States Court of Appeals for the Federal Circuit. See 5 C.F.R. 1201.113, 1201.114; *Ballentine* v. *Merit Systems Protection Board*, 738 F.2d 1244, 1247 (Fed. Cir. 1984); *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1316-1318 (Fed. Cir. 1983); *Wall* v. *United States*, 871 F.2d 1540, 1543-1544 (10th Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

sections of Chapter 75 of the Act, see, *e.g.*, 5 U.S.C. 7511, "displays a clear congressional intent to deny the excluded employees the protections of Chapter 75 —including judicial review—for personnel action covered by that chapter." 484 U.S. at 447. As the Court additionally stated, "[i]t seems to us evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type governed by Chapter 75." *Id.* at 448-449.[4]

Petitioner's reliance on *Webster* v. *Doe*, 486 U.S. 592 (1988), see Pet. 24-26, is misplaced. This Court held in *Webster* that an employee of the Central Intelligence Agency—an agency whose employment practices are *not* covered by the comprehensive remedial provisions of the CSRA—could seek APA review of a colorable constitutional challenge to his dismissal. 486 U.S. at 603-604. That case is readily distinguishable from this one. To be sure, petitioner, as a temporary worker, was not entitled to invoke the *judicial review* provisions of the CSRA. But unlike the plaintiff in *Webster*, he had other CSRA remedies.

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[4] Significantly, temporary workers may seek judicial relief in some circumstances. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, may provide a remedy for unlawful discrimination if the statutory prerequisites are met. See, *e.g.*, *Theard* v. *United States Army*, 653 F. Supp. 536 (M.D.N.C. 1987). *Fausto* makes clear, however, that petitioner cannot obtain judicial review simply by invoking the court's general federal question jurisdiction. Rather, petitioner must identify a specific statute that creates a cause of action.

A temporary worker at the Treasury Department who alleges a "prohibited personnel practice," see 5 U.S.C. 2302, may petition the Office of Special Counsel (OSC) of the MSPB to investigate, and if the OSC concludes that the allegation is meritorious, the OSC may request the MSPB to take appropriate remedial action. See 5 U.S.C. 1206(a)(1), 1206(c)(1)(A) and (B). See also *Spagnola* v. *Mathis*, 859 F.2d 223, 225 & n.3 (D.C. Cir. 1988) (per curiam en banc). Those statutory provisions governing "prohibited personnel practices"—which petitioner did not invoke—were not available to the plaintiff in *Webster*. See 5 U.S.C. 2302(a)(2)(C)(ii).[5]

2. Petitioner contends that the court of appeals' decision in this case conflicts with decisions of the District of Columbia Circuit. See Pet. 16-22. Peti-

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[5] Petitioner also contends that the decision below is contrary to this Court's "summary reversal" in *Bryant* v. *Carlucci*, 488 U.S. 806 (1988). See Pet. 27. That claim is wholly without merit. This Court's decision in *Bryant* was not a summary reversal at all; rather, the Court granted certiorari, vacated the judgment below, and remanded the case for further consideration in light of *Webster*. Although that disposition reflects this Court's view that consideration of the CSRA preclusion issue would be informed by the decision in *Webster*, it was not a holding on the merits. On remand the Fourth Circuit noted that "*Webster* does not directly control this case, because the CSRA did not apply to the CIA employee in that case." *Bryant* v. *Cheney*, 924 F.2d 525, 528 (1991). The Fourth Circuit acknowledged that "by vacating this court's previous ruling, the Supreme Court at least suggested that *Webster*'s admonitions might have relevance" to the issue of CSRA preclusion. *Ibid.* The court declined to resolve the issue, however, because it concluded that the plaintiff lacked standing to pursue a claim for declaratory or injunctive relief. *Id.* at 528-529.

tioner relies principally on *Spagnola* v. *Mathis*, *supra*, in which the D.C. Circuit noted that "time and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights." 859 F.2d at 229-230. The D.C. Circuit's statement in that case, however, provides an insufficient conflict with the Ninth Circuit's decision in this case to warrant further review.

As an initial matter, the D.C. Circuit's statement in *Spagnola* was dictum. The D.C. Circuit granted rehearing en banc in *Spagnola* to consider the availability of so-called *Bivens* remedies in the federal employment context, see 859 F.2d at 224, and the en banc court specifically ruled that *Bivens* remedies were precluded. *Id.* at 230. Accordingly, the D.C. Circuit's decision in *Spagnola* does not pose a genuine conflict with the court of appeals' decision in this case, and review by this Court would not be warranted unless the D.C. Circuit were expressly to reaffirm its view in a future case in which the issue is squarely presented.

This Court's review would be particularly improvident, because the D.C. Circuit's decision in *Spagnola* did not discuss this Court's decision in *Fausto*, which is the leading decision on the CSRA's preclusive effect. The D.C. Circuit's dictum in *Spagnola* cited pre-*Fausto* cases, see 859 F.2d at 230, which now have dubious precedential value, and that court has not had a square opportunity to reconsider its precedents in light of the *Fausto* decision. Given the general agreement among the post-*Fausto* decisions from other courts of appeals that the CSRA

does preclude judicial review through other mechanisms,[6] review by this Court is unwarranted at the present time.

3. For the foregoing reasons, the court of appeals' ruling that the CSRA precludes petitioner's constitutional claim does not warrant review. But even if that issue merited review, this case would not be an appropriate one in which to decide it, because petitioner's constitutional claim is completely without merit. Petitioner invokes the Fifth Amendment's guarantee that no individual shall "be deprived of life, liberty, or property, without due process of law." The Fifth Amendment is inapplicable here, however, because the United States Mint's termination of petitioner's employment did not effect a deprivation of liberty or property.

This Court's decisions make clear that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). In the context of public employment, the Court has held that the existence of a property interest in one's job depends upon the employment status of the affected individual. If an employee has explicitly or implicitly been granted tenure—a guarantee that he can be removed from his position only for cause—his job is regarded as a species of

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[6] See, *e.g.*, *Saul* v. *United States*, 928 F.2d 829, 843 (9th Cir. 1991); *Lombardi* v. *Small Business Administration*, 889 F.2d 959, 961-962 (10th Cir. 1989); *Stephens* v. *HHS*, 901 F.2d 1571, 1574-1576 (11th Cir.), cert. denied, 498 U.S. 998 (1990); see also *Braun* v. *United States*, 707 F.2d 922, 926-927 (6th Cir. 1983).

property, and he may invoke the Due Process Clause of the Fifth or Fourteenth Amendment. See, *e.g.*, *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 538-539 (1985). But if the worker's employment is terminable at the will of his employer, the employee has no property interest in his position. See, *e.g.*, *Bishop* v. *Wood*, 426 U.S. 341, 344-347 (1976).[7]

Petitioner clearly possessed no property interest in continued federal employment. At the time of his dismissal, petitioner was serving under a temporary one-year appointment pursuant to 5 C.F.R. 316.402(b)(4). See C.A. Supp. Exc. Rec. 2. That appointment was accompanied by no explicit or implicit understanding that petitioner could be discharged only for cause. To the contrary, the document that authorized petitioner's appointment stated that "THIS APPOINTMENT MAY BE TERMINATED AT ANY TIME IF YOUR SERVICES ARE NO LONGER NEEDED OR FUNDS ARE NOT AVAILABLE." *Ibid.* (capitalization in original). Absent some "legitimate claim of entitlement to" continued federal employment, *Roth*, 408

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[7] We do not suggest that petitioner could have been dismissed for any reason whatsoever. The CSRA identifies certain prohibited personnel practices. See 5 U.S.C. 2302. For example, even a temporary employee may not be dismissed on the basis of race, 5 U.S.C. 2302(b)(1)(A), or in retaliation for his disclosure of information concerning illegality or gross mismanagement on the part of agency officials. 5 U.S.C. 2302(b)(8). But the existence of some impermissible bases for agency action is not equivalent to a guarantee that a worker may be discharged only for cause: were that equation valid, *every* public employee would possess a property interest in the retention of his job, since the Constitution always imposes some constraints on a public employer's authority to dismiss its workers.

U.S. at 577, petitioner's dismissal was not a deprivation of property triggering the protections of the Fifth Amendment's Due Process Clause. And because the statutory scheme is specifically designed not to confer any property interest that might, in turn, trigger procedural due process rights in connection with a termination, the omission from the statutory scheme of a provision for raising such a procedural due process claim in court raises no serious constitutional question. Moreover, as the concurring judge recognized below, petitioner "did not allege any facts demonstrating that his dismissal from the Mint violated a protected liberty interest." Pet. App. 13.

Because petitioner was not deprived of any constitutionally protected property or liberty interest, his Fifth Amendment claim is without merit. This Court's resolution of the CSRA preclusion issue therefore could not affect the ultimate outcome of the lawsuit.[8]

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[8] Relying on *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959), petitioner argues (Pet. 15) that temporary employees dismissed on security-related grounds are entitled to procedural due process protections. *Vitarelli*, however, did not so hold. That case simply recognized that if an agency has promulgated a rule providing special procedures for national security-related dismissals—and if the agency then discharges an employee on national security grounds—the agency must abide by its rule. See 359 U.S. at 539. *Vitarelli* in fact proceeded on the premise that an employee who does not have civil service protection otherwise could be "summarily discharged by the Secretary at any time without the giving of a reason." *Ibid.*

Petitioner also argues that Exec. Order No. 10,450 "is inapplicable to employees who, like [petitioner], * * * do not occupy sensitive positions involving national security." Pet. 14. That argument is without merit. Although employees in non-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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sensitive positions are exempt from the more elaborate investigations required for employees whose jobs may affect national security, the Executive Order expressly states that "[t]he appointment of each civilian officer or employee in any department or agency of the Government shall be made subject to investigation." Exec. Order No. 10,450, § 3(a), 3 C.F.R. 937 (1949-1953 comp.). While the scope of the investigation will vary according to the sensitivity of the employee's position, "in no event shall the investigation include less than a national agency check (including a check of the fingerprint files of the Federal Bureau of Investigation), and written inquiries to appropriate local law-enforcement agencies, former employers and supervisors, references, and schools attended by the person under investigation." *Ibid*; see Pet. App. 71-72. *Cole* v. *Young*, 351 U.S. 536 (1956), on which petitioner relies (Pet. 15), addressed only the coverage of the "national security" provisions of the Act of Aug. 26, 1950, ch. 803, 64 Stat. 476, as implemented in Exec. Order. No. 10,450. See 351 U.S. at 538, 542 & n.2. It did not address the provisions of the Order applicable to other employees.